

FOR ARGUMENT

No. 99-1782

DEC 17 1990

LEONARD E. SPANGL, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF
COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK and
CIRCLE VILLAGE,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF THE
NATIVE VILLAGE OF TANANA, NATIVE VILLAGE
OF TATITLER, NATIVE VILLAGE OF CHENEGA,
PORT GRAHAM VILLAGE, ENGLISH BAY VILLAGE,
EYAK NATIVE VILLAGE, SITKA COMMUNITY
ASSOCIATION, NATIVE VILLAGE OF SELAWIK,

[Amici continued on inside cover]

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NATIVE VILLAGE OF KOTZEBUR, NATIVE VILLAGE
OF BUCKLAND, NATIVE VILLAGE OF DEERING,
NATIVE VILLAGE OF KIVALINA, NOORVIE NATIVE
COMMUNITY, NATIVE VILLAGE OF SHUNGNAK,
VILLAGE OF AMBLER, KIANA VILLAGE, KOBUK
VILLAGE, BIRCH CREEK VILLAGE, HOLY CROSS
VILLAGE, NATIVE VILLAGE OF FORT YUKON,
IVANOFF BAY VILLAGE, NULATO VILLAGE, NATIVE
VILLAGE OF UNALAKLEET, NATIVE VILLAGE OF
VENETIE, SHAGULUK NATIVE VILLAGE, NATIVE
VILLAGE OF RUBY, ORGANIZED VILLAGE OF
KWETHLUK, NATIVE VILLAGE OF AKIACHAK,
NATIVE VILLAGE OF TOKSOOK BAY, NATIVE
VILLAGE OF SCAMMON BAY, NATIVE VILLAGE
OF BEK, VILLAGE OF KALSKAG, NATIVE VILLAGE
OF KWIGILLINGOK, NATIVE VILLAGE OF
BILL MOORE'S SLOUGH, NATIVE VILLAGE OF
QUINHAGAK, PLATINUM TRADITIONAL VILLAGE,
NATIVE VILLAGE OF KIPNUK, NATIVE VILLAGE
OF SAVOONGA, NATIVE VILLAGE OF STEVENS,
ORGANIZED VILLAGE OF KAKE, CHILKAT INDIAN
VILLAGE OF KLUKWAN, NATIVE VILLAGE OF
GAMBELL, NENDALTON VILLAGE, VILLAGE OF
DOT LAKE, VILLAGE OF EAGLE, HEALY LAKE
VILLAGE, NORTHWAY VILLAGE, NATIVE VILLAGE
OF TANACROSS, ALLAKAKET VILLAGE, NENANA
NATIVE ASSOCIATION, BEAVER VILLAGE, COPPER
CENTER VILLAGE, NATIVE VILLAGE OF
CHISTOCHINA, NATIVE VILLAGE OF TAZLINA,
NATIVE VILLAGE OF CHITINA, MENTASTA
VILLAGE, NATIVE VILLAGE OF CANTWELL,
GULKANA VILLAGE, NATIVE VILLAGE OF GAKONA,
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AKIAK NATIVE COMMUNITY, VILLAGE OF
ALAKANUK, VILLAGE OF ANIAK, VILLAGE OF
ATMAUTHLUAK, VILLAGE OF CHUATHBALUK,
VILLAGE OF CHEFORNAK, CHEVAK NATIVE
VILLAGE, NATIVE VILLAGE OF GOODNEWS BAY,
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VILLAGE, VILLAGE OF KOTLIK, LIME VILLAGE,

NATIVE VILLAGE OF MEKORYUK, NATIVE VILLAGE
OF MOUNTAIN VILLAGE, NAPASKIAK TRADITIONAL
VILLAGE, NEWTOK VILLAGE, NATIVE VILLAGE OF
NUNAPITCHUK, PILOT STATION TRADITIONAL
VILLAGE, NATIVE VILLAGE OF PITKA'S POINT,
NATIVE VILLAGE OF SHELDON'S POINT, ST. MARY'S
VILLAGE (ALGAACIQ), TULUKSAK NATIVE
COMMUNITY, NATIVE VILLAGE OF TUNTUTULIAK,
NATIVE VILLAGE OF TUNUNAK, NATIVE VILLAGE
OF ANDREAFSKY, NATIVE VILLAGE OF LOWER
KALSKAG, NATIVE VILLAGE OF HAMILTON,
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HAIDA INDIAN TRIBES OF ALASKA, COUNCIL OF
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BRIEF AMICI CURIAE

INTERESTS OF AMICI

Amici Indian, Aleut and Eskimo villages are 94 of the federally-recognized tribes identified in the 1971 Alaska Native Claims Settlement Act, spread across a vast area one-fifth the size of the contiguous United States and representing in the aggregate in excess of 80,000 Alaska Natives.¹ They have inhabited Alaska since time immemorial and have a vital interest in preserving both their recognized tribal status and their full access to federal court to redress state action violative of their retained inherent sovereignty.

Amicus Alaska Federation of Natives is a statewide Alaska Native organization that strongly supports village tribal rights and was deeply involved in securing passage of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. 1601, *et seq.* *Amicus* Northwest Arctic Borough is a political subdivision of the State of Alaska and has by ordinance formally recognized the eleven villages (including Respondent Native Village of Nontak) situated within its borders as Native American tribes which are "organized as bodies politic . . . eligible for borough funding, grants and contracts" to assist in governmental activities at the tribal level.²

Amicus Tlingit and Haida Indian Tribes of Alaska are a confederated federally-recognized tribe comprising approximately 16,000 enrolled members.³ The Tlingit and

¹ There are 200 Native village tribes in Alaska stretching from from the southern extremity of the Alaska panhandle to the furthest northern and western regions of the continent. They embrace an area roughly equal to the combined land mass of California, Oregon, Washington, Montana, and Arizona similarly containing in the aggregate 189 Native American tribes.

² Northwest Arctic Borough Code 02.90.010 (1990).

³ See Act of June 19, 1933, 49 Stat. 388, as amended by the Act of August 19, 1963, 79 Stat. 543; *Tlingit and Haida Indians of Alaska v. United States*, 389 F.2d 778, 781 (Ct. Cl. 1968) (compensating tribal claims of aboriginal title).

Haida Central Council, the tribal governing body elected under federally approved rules, currently administers \$6 million in programs benefitting its members under the terms of the Indian Self-Determination Act, 25 U.S.C. 450 *et seq.*, and other legislation. As the governing body of the largest tribe in Alaska, the Central Council has an abiding interest in the maintenance of tribal status throughout Alaska. Amicus Council of Athabascan Tribal Governments is an intertribal organization working on behalf of the several Athabascan Gwitch'in Tribes of Alaska.

Amicus Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting and enhancing the self-government rights and culture of American Indians and Alaska Natives. The Association is the largest Indian-interest organization in the United States.

Amici offer this brief in response to the second question presented in Alaska's petition for a writ of *certiorari*: whether the Native American villages identified in the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. 1601 *et seq.* ("ANCSA"), are federally recognized tribes, qualified to bring suit under 28 U.S.C. 1362.⁴

INTRODUCTION

Of all the Nation's aboriginal inhabitants, perhaps none have succeeded better in holding fast to their rich and diverse cultures, traditions, lifestyles and languages than the 200 Indian Eskimo and Aleut tribes of Alaska.

⁴The Ninth Circuit below held that (1) a federal question is presented when it is alleged that a state has deprived a tribe of a state benefit on account of race; (2) a tribe may assert such a claim in federal court against a state for money damages notwithstanding the Eleventh Amendment; (3) a recognized tribe may predicate such a claim on 28 U.S.C. 1362; and (4) the plaintiff villages are duly recognized Native American tribes that may properly prosecute such claims. This brief is offered to assist the Court's deliberations on the fourth issue in the event the first three issues are resolved in Respondents' favor.

Protected from the dominant society by extreme isolation,⁵ a harsh environment and relatively recent incorporation into the United States,⁶ Alaska Native tribes largely managed to escape the period of Indian wars, the treaty period, the Indian removal period, the reservation period, and the allotment period, all aspects of a long-discredited federal policy of suppressing (if not eliminating) tribal self-governance in favor of assimilation.⁷

The good fortune of Alaska's tribes is reflected in the character of their lives today. Thus, throughout village Alaska, Native people literally live off the land, engaging in a subsistence way of life that is intimately woven into the shifting seasons and the migratory patterns of caribou, whales, seals, walrus, salmon, geese, and countless other species.⁸ Long summer days are spent curing, smoking, salting or drying subsistence foods, gathering berries, cutting wood and making preparation for the nine-month long winter. Through these activities the values of the tribal community are passed on from generation to generation.⁹

⁵Most Alaska Native villages are overwhelmingly inhabited by Indians, Eskimos or Aleuts. According to the 1980 decennial census of the U.S. Bureau of Census, three-quarters of the population of each counted village is over 75% Native, and over 90% of the villages are in excess of 50% Native. In 107 villages, over 90% of the population is Native.

⁶See Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339 (1958), as amended; see also Treaty of Cession (March 30, 1867), United States-Russia, 15 Stat. 539, T.S. No. 301; District Organic Act of 1884, 23 Stat. 24 (1884); Territorial Organic Act of 1912, c. 387, 37 Stat. 512 (1913).

⁷See generally F. Prucha, *The Great Father* (1984); F. Cohen, *Handbook of Federal Indian Law* 47-206 (1982) (discussing the sequential periods of federal Indian policy).

⁸See generally T. Berger, *Village Journey, Report of the Alaska Native Review Commission*, 48-72 (1985).

⁹See, e.g., Alaska Department of Fish and Game, Division of Subsistence, *Subsistence in Alaska, Arctic, Interior, Southcentral, Southwest, and Western Regional Summaries* at 67, 123, 172, 226

No other aboriginal people in America have succeeded so well in retaining their hunting, fishing and gathering societies into the eve of the Twenty-First century,¹⁰ and in maintaining thriving cultures, one foot in each world, founded on traditional practices and values adapted to modern needs and circumstances. Against this background it is remarkable that challenges persist¹¹ against past long-standing recognition of the inherent tribal status of Alaska Native villages. The relatively protected history of Alaska's Indian, Eskimo and Aleut villages, and their escape from the Nation's removal and reservation policies, surely by all logic cannot and should not leave them with fewer attributes of "domestic dependent nations" as quasi-sovereign tribes than their more acculturated brethren in the 48 contiguous states. *Amici* demonstrate below that the Ninth Circuit was clearly correct in its conclusion that the Native villages of Alaska, whether organized traditionally or organized under Sec-

(Technical Paper No. 150) (1987); United States Department of the Interior, Fish and Wildlife Service, *Subsistence Management & Use; Implementation of Title VIII of ANILCA* at II-2.5 (1985) (hereinafter "Subsistence Use"); Alaska Department of Community & Regional Affairs, *Does One Way of Life Have to Die So That Another Can Live?* (1974) (copy lodged with the Clerk of the Court).

¹⁰ In many villages today the Native language remains predominant. These languages include three broad language families consisting of eleven different Athabascan Indian languages (in the interior of Alaska); Eyak, Tlingit and Haida (along the southeast coast); and several Inupiaq, Yupik and Aleut dialects (in western and northern Alaska). E. Smith and M. Kancewick *The Tribal Status of Alaska Natives*, 61 Colo. L. Rev. 455, 485 (1990) ("Smith and Kancewick"). The Athabascan languages in Alaska are also spoken among the Navajo and Apache of the contiguous 48 states.

¹¹ For a general discussion of recent litigation involving the powers and immunities of Alaska Native tribes, see L. Miller, *Caught in a Crossfire: Conflict in the Courts, Alaska Tribes in the Balance*, 1989 Harvard Indian Law Symposium 135-151 (by the President and Fellows of Harvard College).

tion 16 of the Indian Reorganization Act (25 U.S.C. 476), are indeed sovereign tribes on an equal footing with other Native American tribes in the United States and are thus fully empowered to bring suit against the State of Alaska under 28 U.S.C. 1362 to vindicate their federally-protected rights.

SUMMARY OF ARGUMENT

Recognition of a Native American group as a tribe is within the exclusive province of the Federal Government acting through Congress or the Executive Branch, whose affirmative judgment in such matters represents a political question not reviewable by the courts.

Consistent with this Court's acknowledgment in *Tee Hit Ton Indians v. United States*, 348 U.S. 272 (1955), Congress has long treated Alaska Natives as distinct Native communities comprising recognized tribes. This congressional recognition is consistent with the extant anthropological and ethnographic literature regarding the political structures of Alaska Native communities, including special congressionally mandated studies.

In the Alaska Native Claims Settlement Act of 1971 Congress necessarily recognized Alaska Native villages as distinctly Native communities comprising tribes, and has since repeated that recognition in a broad range of other legislation. To the same effect have been the consistent and uninterrupted actions of virtually every department of the Federal Government, including the Department of the Interior.

The recognized status of Alaska Native village tribes is further reflected in the tremendously vital and rich functions performed by Indian, Eskimo, and Aleut tribes today. By administering programs and providing for the health, safety and public welfare of their members, the tribes continue to exercise the prerogatives of self-governing "domestic dependent nations" which have long been recognized by the Federal Government.

ARGUMENT

THE ALASKA NATIVE VILLAGES IDENTIFIED IN THE ALASKA NATIVE CLAIMS SETTLEMENT ACT OF 1971 ARE RECOGNIZED TRIBES QUALIFIED TO BRING SUIT UNDER 28 U.S.C. 1362.

A. Congressional and Executive Branch Determinations Recognizing the Tribal Status of Native American Groups are Primarily "Political Questions" which are Not Reviewable in the Courts.

"Indian tribes consistently have been recognized . . . as 'distinct independent, political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." F. Cohen, *Handbook of Federal Indian Law* 232 (1982 Ed.) ("Cohen") quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). See also *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). That original sovereignty inheres in a "tribe" "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory" *Montoya v. United States*, 180 U.S. 261, 266 (1901). Determining which Native American communities constitute "tribes" is largely a "political" question of "recognizing" a community to be a tribe, a question within the exclusive province of Congress. *U.S. v. Holliday*, 70 U.S. (8 Wall.) 407, 419 (1865).

"Recognition" of a tribe often is effected by Congress in the context of a government-to-government agreement with the tribe, embodied in a treaty or a statute. Such recognition, however, need not be expressly stated and typically is not. Cohen, *supra* at 3-4. Rather, by the very fact of 'treating' or legislating with respect to a tribal entity, Congress is deemed to have recognized the sovereign status of that tribe. That is, since the relationship between tribes and the Federal Government is a political one, congressional action with respect to a dis-

tinently Native American community constitutes confirmation of the community's political quasi-sovereign status.¹²

On some occasions Congress is more explicit, as when it specifically defines an Indian entity to be a tribe in a statute. Similarly, Congress has at times delegated part of its power to recognize particular groups as "tribes" to the Secretary of the Interior, as it has in Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, and in 25 U.S.C. 1, 2 and 9.¹³ In other instances, congressional action is less explicit, though just as direct, as when this Court concluded that the Pueblos—"distinctly Indian communities"—qualified as recognized tribes in major part by virtue of their dependency and receipt of federal Indian services. *United States v. Sandoval*, 231 U.S. 28, 39-40, 46, 47 (1913). These "political" judgments are final and binding, *Sandoval, supra* at 46; *Holliday, supra* at 419; *Perrin v. United States*, 232 U.S. 478 (1914), the only limitation on congressional authority being that Congress may not arbitrarily take a group of non-Indians and deem them to be a politically sovereign "tribe." *Sandoval, supra* at 46.

¹² As noted in Respondent Nontak's brief, Resp. Br. at —, Congress's power in this area is broad, and it is not limited to so-called "historical" or "ethnological" tribes. Cohen *supra* at 5-6. Thus, in the course of recognizing the tribal status of some 500 politically distinct modern-day tribes in the United States, Congress has frequently divided historic tribes, consolidated (or confederated) historic tribes, and even done both simultaneously. Clearly Congress has never considered itself limited to recognizing as tribes only the modern-day successors to historic tribes (although, as discussed below, in Alaska Congress has, in fact, typically done so).

¹³ *James v. U.S. Department of Health and Human Services*, 824 F.2d 1132 (D.C. Cir. 1987); see also 25 C.F.R. pts. 31, 32 and 83 (1990); Cohen, *supra* at 13-16. In the absence of congressional or secretarial recognition, unrecognized tribal status may in the alternative be judicially proven and, with it, the inherent sovereign authority which flows from that status. *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 585-87 (1st Cir.) *cert. denied*, 444 U.S. 866 (1979).

B. In Enacting the Alaska Native Claims Settlement Act of 1971 Congress Was Well Aware and are Today Distinctly Native Communities Comprising Tribes.

Congress has long been well aware of the tribal nature of Alaska Native societies.¹⁴ For instance, one year prior to Congress's passage of amendments to the Indian Reorganization Act (IRA) to address unforeseen difficulties in the Act's application in Alaska,¹⁵ the U.S. Office of Education commissioned a special study on Alaska Inupiaq and Yupik Eskimo and Aleut villages. H.D. Anderson and W.C. Eells, *Alaska Natives: A Survey of Their Sociological and Educational Status* (1935). Anderson and Eells found that the permanent village was a political, self-governing unit that had long been the characteristic community for Alaska Natives. *Id.* at 31-37, 48-50. They disavowed the erroneous, uninformed view that traditional self-governance did not exist, stating that such a view "fail[s] utterly to take into account those naturally developed means of social control which serve the purposes of government and in fact are government." *Id.* at 48. After exhaustively describing Eskimo and Aleut forms of governance,¹⁶ Anderson and Eells concluded that

¹⁴ Congressional recognition of the tribal status of Alaska Native communities began with the original 1867 Russian American Treaty of Cession. See Article III of the Treaty of March 30, 1867, 15 Stat. 539, making express provision for the "native tribes" uncivilized tribes [in the ceded territory of Alaska] will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country". See also Secretary Seward's Memorandum to President Johnson and Russian Minister Stoeckl's dispatch, both discussing Article III, in Miller, *The Alaska Treaty* at 71, 81 (1981).

¹⁵ See Act of May 1, 1936, 49 Stat. 1250, codified in part at 25 U.S.C. 473a.

¹⁶ See generally Anderson and Eells at 48-50. (Ch. VIII, *Early Social Organization and Government*), 144-150 (Ch. XX, *Social Organization and Government*). Accord A. Fienhup-Riordan, *Regional Groups on the Yukon-Kuskokwim Delta* (Etudes Inuit 1984) (describing the regional confederations among the Yupik villages of the lower Yukon-Kuskokwim Rivers).

"all the necessary indications of a 'tribe' existed." *Id.* at 146.¹⁷

Indeed, to conclude the single villages were not self-governing entities—tribes—since long before the Alaska Purchase is to suggest Alaska's Native people simply lived in chaos, in a state of anarchy, with no internal forms of control for managing village life and interacting with others.¹⁸ As Congress well understood at the time of ANCSA's consideration, the facts are otherwise.

¹⁷ With this report in hand Congress in 1936 amended the IRA to overcome drafting limitations in the original Act which had unintentionally impeded implementation of the Act of Alaska. Chief among these was the requirement that Indians reside on a reservation, a requirement eliminated in the 1936 IRA Amendment. See generally Respondent Noatak Br. at —.

¹⁸ This Court has previously acknowledged the tribal status of Alaska Native communities. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). See, e.g., 348 U.S. at 273, 275, 279, 282, 285, 286 (noting the Tee-Hit-Ton to be "a clan of the Tlingit tribe, an identifiable group of American Indians . . . residing in Alaska" and a "tribe" with "tribal" attributes including sovereign land claims), 287-288 (observing "that land claims among the Tlingits, and likewise of their smaller group, the Tee-Hit-Tons, was [sic] wholly tribal. It was more a claim of sovereignty than of ownership", and concluding "that the [Tribe's] use of its lands was like the use of the nomadic Indians of the [Lower 48] states Indians.").

As the American Indian Policy Review Commission noted, "Quite clearly, Alaska Natives were governing themselves for thousands of years prior to their contact with the Russian-American Company or the U.S. Government." American Indian Policy Review Commission, *Special Joint Task Force Report on Alaskan Native Issues* 21 (1976). See also, *Russian Administration of Alaska and the Status of the Alaskan Natives*, Sen. Doc. No. 152, 81st Cong., 2d Sess. (1950). In a comprehensive and more recent treatise specifically directed to the legal status of Alaska Natives, a review of much of the extant anthropological literature led to the same conclusion:

All Alaska Native traditional societies had political systems (structures and processes) which governed their members and controlled individual behavior. These arrangements, like those in many other Native American societies, operated successfully

Congress obtained a wealth of information during its deliberations over Alaska's aboriginal land claims when it commissioned the Federal Field Committee for Development Planning in Alaska to study all aspects of Alaska Native life. This massive study of Alaska Native history, society, resource use, land use and economic status formed the factual basis for the settlement of Alaska Native land claims.¹⁹ Entitled *Alaska Natives and the Land*, the report divided the state for descriptive purposes into several regions, corresponding to ethnological linguistic groupings of Native people. It then described for each region of the state and in varying degrees of detail the available social and anthropologic data regarding the political organization of Native villages.²⁰ \

in the absence of specialized political institutions or centralized state governments. Ideological beliefs and customary laws defining interpersonal relationships and spiritual relationships to the environment and wildlife created a tacit, yet powerful, sanction system which contributed to the maintenance of social order. Mechanisms for identifying a society's territory and political autonomy and for regulating external relationships with other societies existed in all cultural groups.

D. Case. *Alaska Natives and American Laws* 333 (1984) (emphasis added) (hereafter "Case"). See also Case at 361-62; Cohen at 750-752. Similar observations are contained throughout volumes 5 and 6 of the Smithsonian Institution's multi-volume treatise on North American Indians. This massive and authoritative ethnography of Native Americans describes at length the tribes and political self-governing structures of Alaska's Native people. Smithsonian Institution, *Handbook of North American Indians*, Vol. 5 (Arctic), Vol. 6 (SubArctic).

¹⁹ Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* (1968). This report was prepared at the request of Senator Henry M. Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, and is recognized as a principal factual basis for much of ANCSA. The Report is a formal part of ANCSA's legislative history, S. Rep. No. 405, 92d Cong., 1st Sess. 73-74 (1971).

²⁰ Respondent Noatak is an Inupiaq Eskimo Tribe situated north of Kotzebue. Respondent Circle is a Gwitch'in Athabascan Indian tribe situated in Northeastern Alaska south of the Brooks Range

The Field Commission confirmed for Congress the tribal nature of Native societies. For example, with reference to the Bering Strait Eskimos (the people living just to the south of the Noatak and other Northwest Inupiaq Eskimos), the study found:

[as to] the fancy that Eskimo people had no political or territorial concepts, boundaries to property or hunting territories[:]. Quite the contrary was actually true. . . . The Bering Strait Eskimo did not live in anarchy; he lived in a well-ordered society in which a chief and often a council played an important role. The influence of their government extended over a definitely bounded territory within which the inhabitants were directed by a system of rules and laws.

Alaska Natives and the Land at 144, 146.²¹

along the Yukon River. Although amici therefore focus discussion on these regions, the tribal characteristics of their villages are similarly documented throughout the other Eskimo, Aleut and Indian tribes of Alaska.

²¹ *Alaska Natives and the Land* relies heavily on work by Dorothy Jean Ray, noted authority on the Bering Strait Eskimos. *Alaska Natives and the Land* at 147-152. More recent work by Ray explains in considerable detail the tribal structure of that Eskimo people:

A tribe consisted of people with a common language and culture living within well-defined boundaries recognized by themselves and contiguous tribes. A tribal territory usually included a large river and all the land drained by its tributaries. . . .

Ray, *Kotzebue Sound Eskimo* in 5 *Handbook of North American Indians* 285, 286 (1984). Accord, Ray, *Eskimos of the Bering Strait 1650-1898*, 105-106 (1975). The focal point of the Eskimo village was the kashim or "men's house" which served as the political and social center for the community. *Eskimos of the Bering Strait*, *supra* at 106-107.

Ernest S. Burch, Jr., the principal, modern commentator on the anthropology of Northwest Alaska Eskimos has found that the same conclusions apply to the Eskimos of that region, including the Noatak people. See Burch, *Kotzebue Sound Eskimo*, in 5 *Handbook of North American Indians* 303 (1984); Burch, *The Cultural and Natural Heritage of Northwest Alaska*, in V *The Inupiaq Nations*

The Gwitch'in Indians (including those living in the vicinity of what is now Circle) were similarly described by the Field Commission as "tribes." *Alaska Natives and the Land* at 205. The Commission noted that while these peoples were perhaps more nomadic than the coastal Eskimos, they nonetheless inhabited villages "on the main rivers and streams . . . [which] acted as base occupation centers and were complementary to many family and group fish campsites along the rivers and interior hunting and trapping camps." *Id.* at 207. Again, other anthropological work has confirmed this conclusion.²²

As the Field Commission observed, village "tribal" structures also historically existed in the other regions of Alaska.²³ Those tribes, and their accompanying social

of Northwest Alaska (1985) (unpublished manuscript) (copy lodged with the Clerk of the Court). As Burch notes:

[Ray] has depicted the early contact Eskimo as having been organized in terms of relatively cohesive political units which she called "tribes" each with a general adjustment to its surroundings. My own research has confirmed Ray's findings, and has permitted me to extend them analytically, temporally, and geographically.

E.S. Burch, Jr., *Traditional Eskimo Societies in Northwest Alaska, Alaska Native Culture and History*, in *Senri Ethnological Studies* No. 4 at 253 (1984).

²² See, e.g., Caulfield, *Subsistence Land Use in Upper Yukon-Porcupine Communities, Alaska*, Alaska Department of Fish and Game Technical Paper No. 16 at 92, 111-14, 127-31, 145-49 (1983) ("Caulfield"); Slobdin, *Kutchin* in 6 *Handbook of North American Indians* 514-15, 520-24 (1984). A study commissioned by the Alaska Department of Education agrees. See Peratrovich, *Source Book on Alaska* at 27 (1971) ("Each group is headed by some man who, by common consent, is recognized as chief. . . . Community affairs are settled by a general council in which the chief and the older men of the group rule").

²³ E.g., *Alaska Natives and the Land* at 47 (villages generally), 129-137 (Arctic Slope Eskimos), 178-187 (Southwest Coastal Eskimos), 195-201 (Koyukuk-Lower Yukon Eskimos and Indians), 222-229 (Bristol Bay Eskimos), 236-243 (Aleuts), 264-269 (Chugach and Eyak Indians). The Tlingit and Haida Indians were also

and governmental structures, survived and adapted to contact with Western culture. As the leading modern Indian law treatise concludes:

Customary society underwent many alterations after contact, first with Russians and later with Americans, *although virtually every Native village or community retained some kind of traditional self-governing structure*. Most established councils for community decision-making and dispute adjustment. The councils employed procedures and adopted rules reflecting their origins as hybrids of the influence of the non-Natives who urged their establishment and Native tradition which persisted in importance.

Cohen at 750-751 (emphasis added) (footnotes omitted). See generally *Alaska Natives and the Land*, at 41, 87, 130-31, 187, 197, 207, 212, 220, 224-25, 238-39 (describing forces affecting traditional communities).

The modern-day Indian, Aleut and Eskimo villages retain direct links with the Natives' ancestral sites. The Gwitch'in Indians, for example, were divided into eight tribes, each with well-defined territories, that "recognized a relationship which united them into what . . . might be called correctly enough a nation." Osgood, *Kutchin Tribal Distribution and Synonymy*, 36 *Amer. Anthropologist* 168, 169 (1934). For those Gwitch'in tribes located in Alaska,²⁴ each tribe lived in a particular area within the Gwitch'in Nation, an area that corresponds precisely to a modern-day village. For example, the present residents of Circle are descendants of the Kutchakutchin who lived along the Yukon River, as well

organized in villages, governed by clans, *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 455-456 (Ct. Cl. 1959).

²⁴ These tribes include the Kutchakutchin, the Tranjikkutchin, the Natsitkutchin, and the Birch Creek Kutchin. *Alaska Natives and the Land* at 206; 6 *Handbook of North American Indians* at 514-15.

as those living in Charley's Village;²⁵ Circle itself is located near an historic village site.²⁶

Like the Gwitch'in and other aboriginal tribes, the tribes of the Bering Strait were keenly aware of their own territories and took special care to guard their territorial integrity:

As between sovereign nations today, permission was needed to travel between tribes, and names were the

²⁵ The residents of Charley's Village moved to Circle in 1914 after Charley's Village was destroyed by ice. *Alaska Natives and the Land* at 206 (noting that some Circle residents were Hankutchin). Outside pressure on these villages, though late, was severe. Thus in discussing the problems caused by the establishment of a trading post at a Native village site at Fort Yukon, the Bishop of Alaska asked:

Have the Indians no rights? I mean exclusive rights in the villages of immemorial times? . . . This is an instance—a flagrant one—but one that is typical of what has gone on at Eagle and Circle and Rampart and Tanana.

Letter dated March 9, 1914 from Rev. P.T. Rowe to Secretary of Commerce Redfield; (emphasis added) (copy lodged with the Clerk of the Court). Circle is also the burial place of a famous Gwitch'in chief. See Caulfield *Gwitch'in Athabascan Place Names of the Upper Yukon-Porcupine Region—Alaska: A Preliminary Report*, Alaska Department of Fish & Game, Technical Report No. 83 at 8 (1983).

It is important to note in this context that the Federal Government established a one-acre reserve at Circle in 1910 (Executive Order No. 1194 (April 26, 1910)), and later considered establishing a 75-square mile reserve. Attachment to letter dated April 17, 1944 from T.W. Wheat, Assistant Director of Lands, Office of Indian Affairs, Field Service, to William Zimmerman, Assistant Commissioner of Indian Affairs (copy lodged with the Clerk of the Court).

²⁶ Similarly, *amicus* Chalkyitsik residents are Tranjikkutchin who lived in settlements along the Black River; the present village site in a seasonal fish camp that became a permanent village when a school was built. Caulfield at 127-31. A similar history applies to the present villages of *amicus* Venetie and Arctic Village, home to the Natsitkutchin; to *amicus* Fort Yukon, home of the Kutcha-kutchin; and to *amicus* Birch Creek, home to the Birch Creek

important passports that proved relationships and served as entry to another territory.

Eskimos of the Bering Strait, supra at 108.²⁷ Anthropologists identify twelve tribes in Northwest Alaska extant between 1800 and 1825, with a remarkable identity between these historical nations and the present villages. Notable among them, for purposes of this case, is the *Napaaqturmiut* Tribe, or lower Noatak, from which it may be reliably inferred that the Native Village of Noatak is descended.²⁸

The Field Commission documents similar and extensive correspondences between historical tribal locations and present-day Native villages throughout Alaska.²⁹ In

Kutchin. *Alaska Natives and the Land* at 206; Caulfield at 92, 111-14, 145-49, 170-73.

²⁷ These boundaries actually defined the tribe and its territory:

The largest village lent its name to the tribe. Thus *Kauweramiut* or "people of Kauwerak," meant essentially "the people who lived in territory presided over by the people of Kauwerak."

Eskimos of the Bering Strait, supra at 106. Burch notes that the entities variously referred to by Ray as "tribes" might more properly be called "nations." In Inupiaq the term is *nunatqatigiit*:

Nation is an appropriate word to use because *nunatqatigiit* were, in fact, organizations of a type that were analogous to countries, or nations, in the modern world. They were viewed in essentially those terms by the peoples who comprise their citizenry.

The Inupiaq Nations of Northwest Alaska, *supra* at 1.

²⁸ See 5 *Handbook of North American Indians* at 304, Fig. 1 "Societal territories, about 1800 to 1825"; Inupiaq Nations of Northwest Alaska, *supra* at 11, Fig. 3 "Political Map of Northwest Alaska, ca 1800-1825." These maps specifically identify the territory of *Napaaqtugmiut* with that area occupied by the present village of Noatak.

²⁹ The Field Commission report contains maps of historical and contemporary tribal locations for each ethnographic region of the state. See, e.g., *Alaska Natives and the Land* at 136-137 (Arctic Slope); 156-157 (Bering Strait Region including the Northwest Arctic); 210-211 (Upper Yukon-Porcupine Region); 278-279 (Southeast Alaska).

most cases, the villages are located at or near traditional sites; in others, a tribe changed location due to natural disasters or the establishment of schools or trading posts, though it nonetheless remained within the territory it traditionally claimed for resource gathering.³⁰ The inevitable conclusion that emerges from this considerable body of literature is that the modern-day Native villages like Noatak and Circle are the successors to the "tribes" or "nations" which occupied these same areas since time immemorial. These are the facts and conclusions upon which Congress relied in crafting the 1971 settlement of Alaska Native tribal land claims.

Given the conclusive data presented by the Field Commission, and confirmed by other work, it is clear Congress has been well aware that in dealing with the villages, it has been treating with *tribes* which in all relevant respects are identical to those it has treated with elsewhere in the United States. Any contrary determination would be at odds with the overwhelming evidence from existing historical, ethnological and anthropological literature—and more importantly, with the very information provided to Congress in crafting ANCSA.

Congress's manner of treating with the Native Villages was identical to the method it traditionally employed when dealing with other tribal land claims;

The consistent policy of the United States in its dealings with the Indian Tribes has been to grant them title to a portion of the lands which they occupied, to extinguish the aboriginal title to the remainder of the land by placing such land in the public domain, and to pay the fair value of the title extinguished.

H.R. Rep. No. 523, 92d Cong., 1st Sess. 4 (1971). Congress thus granted the Natives title to some land, extin-

³⁰ See, e.g., Caulfield at 127-31 (Chalkytsik). For instance, like many other maritime villages devastated by Alaska's 1964 earthquake, *amicus* Native Village of Chenega established a new village nearby.

guished aboriginal title to the remainder, and paid the Natives some one billion dollars for that extinguished title.³¹ Congress, in short, clearly understood and treated with the villages as *tribes*.³²

Congress' identification of the eligible villages in ANCSA therefore entails two basic conclusions. First, since only tribes may hold (and therefore cede) aboriginal title, Congress necessarily determined those villages to be the relevant tribal entities.³³ Second, Congress

³¹ See generally 43 U.S.C. 1601 et seq. Congress did make one departure from its usual practice: it provided that the cash and lands would be managed largely by village corporations established by the tribes themselves. The use of corporations as stewards of the land settlement is not dissimilar from the special federal corporations authorized to be established under Section 17 of the 1934 Indian Reorganization Act, 25 U.S.C. 477. In both instances Congress viewed the corporate form as holding considerable promise for guaranteeing the future economic self-sufficiency of Alaska Natives and American Indians, and in both instances special provisions were made to protect the tribal estate. Compare 43 U.S.C. 1606(h) (generally prohibiting alienation of Native stock and providing that stock inherited by non-Natives "shall not carry voting rights"); 1620(d) (exempting undeveloped settlement lands from taxation for twenty years); and 1636(d) (exempting forever all undeveloped settlement lands from third party claims of adverse possession, from real property taxes, and from judgment execution); with 25 U.S.C. 476 (confirming power of IRA-organized tribe "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe").

³² In its deliberations over ANCSA Congress was well aware of the Federal Government's trust responsibility to Alaska "tribes," a trust underlying the provision of hundreds of millions of dollars in Native health, education and social service programs. Ultimately Congress rebuffed suggestions the tribal trust should be terminated in the settlement as being inconsistent with the current era of Indian self-determination. See, e.g., 116 Cong. Rec. 24217, 24220-24227, 24234-24235, 24378-24381 (debates between Senators Gravel, Harris, Hollings, Stevens, Kennedy and Jackson on S. 1830) (daily ed. July 14-15, 1970).

³³ Contrary to Petitioner's suggestion, Pet. Br. at 35, Congress expressly limited the land claims settlement to tribal villages "not

found as a matter of law that those villages were "distinctly [Native] communities," *Sandoval*, 231 U.S. at 46.³⁴ As such, like the recognized tribes of the "Lower 48" states, there simply is no occasion for requiring each Native village in Alaska to prove its distinctly Native character.³⁵ Congress made that judgment in ANCSA, a factual and political determination that is far from arbitrary and hence binding on this Court.

C. The Tribal Status of Alaska Native Villages Is Demonstrated by the Federal Government's Repeated Recognition of that Status and by the Extensive Governmental Activities The Villages Now Undertake.

1. Since the Alaska Native Claims Settlement Act of 1971 Congress and the Executive Branch have Repeatedly Recognized the Tribal Status of the Alaska Native Villages Identified in ANCSA.

The tribal status of the ANCSA villages has been recognized in virtually all modern Indian legislation enacted since 1971. For instance, in the 1978 Indian Child Welfare Act ("ICWA"), 25 U.S.C. 1901 *et seq.*, Congress recognized the tribal status and governmental authority of "any Alaska Native village [identified in ANCSA],

of a modern and urban character, [where] a majority of the residents are Natives." 43 U.S.C. 1610(b)(2)(B), (b)(3)(B). Southeast tribes whose claims had previously been adjudicated by the U.S. Court of Claims also participated in the settlement, albeit on a more limited basis than tribes elsewhere, 43 U.S.C. 1615(a), (b) and (c).

³⁴ See also *Alvarado v. State*, 486 P.2d 891, 899-900 (Alaska 1971) (remarking on the "stark contrast" and "enormous gulf" existing between Native villages and other Alaskan communities).

³⁵ The Ninth Circuit's suggestion otherwise in *Native Village of Venetie v. State of Alaska*, No. 88-3929, Slip Op. at 13600-604, — F.2d — (9th Cir. Nov. 6, 1990) is wrong. Clearly this Court has never made any distinction between recognized tribes which are modern-day successors to so-called "historic tribes," and those which are not. See discussion, *supra* at — n. —. Compare *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (involving a non-historic tribe) with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (an historic tribe).

25 U.S.C. 1903(8). In doing so Congress specifically reconfirmed village tribal authority in the area of domestic relations jurisdiction over tribal children, an essential attribute of the retained sovereignty of Native American tribes. *Fisher v. District Court*, 424 U.S. 382 (1976); *United States v. Quiver*, 241 U.S. 602 (1916).

More recently, in the 1986 Superfund Amendments and Reauthorization Act, 42 U.S.C. 9601(36), Congress identified *Alaska Native villages* as tribes when it expanded the Act's scope to authorize the Environmental Protection Agency to treat tribes as states for various environmental purposes (such as the clean up of hazardous waste sites and responding to hazardous spills).³⁶ Again, only this month President Bush signed into law the 1990 Clean Air Act Amendments, putting all tribes, including *Alaska Native villages*, exercising "substantial governmental duties and powers" over any "area[s] within the tribe's jurisdiction" on an equal footing with states for most purposes.³⁷

Whether the subject has involved such specific essential governmental functions as domestic relations jurisdiction and environmental protection programs, or simply general governmental activities such as the training, strengthening and improvement of tribal governments and their employees,³⁸ Congress has time and again delib-

³⁶ To the extent some aspects of the Act's tribal provisions may be limited to lands owned by or under the jurisdiction of a tribe, clearly many Alaska tribes would qualify. See *e.g.* 43 U.S.C. 1615(d)(1) (lands owned by Chilkat Indian Village); *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390-91 (9th Cir. 1988) (holding tribal civil jurisdiction over non-reservation lands turns on whether such lands qualify as a "dependent Indian community" under 18 U.S.C. 1151).

³⁷ See Secs. 107(b), (d), Pub. L. 101-549, amending 42 U.S.C. 7601(d), 7602(r). See also the Solid Waste Disposal Act, 42 U.S.C. 6903(13)(A) (treating Alaska Native villages identically with other Indian tribes for financial assistance and other purposes).

³⁸ See Intergovernmental Personnel Act of 1971, as amended, 42 U.S.C. 4701, 4762(5).

erately acknowledged the Alaska villages defined and identified in ANCSA to be "tribes" on an equal footing with other Indian tribes,³⁹ an overwhelming course of dealing

³⁹ See e.g. 5 U.S.C. 3371(2)(C) (relating to assignment of federal personnel to tribal governments under the Intergovernmental Personnel Act); 13 U.S.C. 181, 184(1) (treating every "Alaska Native village" as a "local unit of general purpose government" under the Census Act); 20 U.S.C. 4402(5) (relating to tribal involvement in the Institute of American Indian and Alaska Native Culture and Arts Development); 25 U.S.C. 472a(f)(1)(A) (relating to the authority of a tribal organization to waive the Indian preference laws applicable to positions within the Bureau of Indian Affairs and the Indian Health Service); 25 U.S.C. 1452(c) (access to revolving loan fund, loan-guaranty and loan insurance programs established under the Indian Financing Act of 1974); 25 U.S.C. 2011(f)(2)(A) (authority of tribal organization to waive Indian preference laws applicable to BIA educators under 1978 Indian Education Act); 29 U.S.C. 1671(c)(1)(A) (tribal participation in comprehensive training and employment programs established under the Job Training Partnership Act); 42 U.S.C. 5122(6) (addressing Native villages as local governments in the Disaster Relief Act); 42 U.S.C. 5302(a)(17) (including Alaska Native Villages as tribes in the Housing and Community Development Act); 42 U.S.C. 6707(a)(1), (h)(2)(B) (targeting Alaska Native villages in the Public Works Employment Act tribal set-aside program); 42 U.S.C. 6723(c)(3)(D)(ii) (extending local government emergency support payments under the Public Works Act to tribes, including any "Alaska Native village"); Sec. 2(7) of the Native American Grave Protection and Repatriation Act of 1990, Pub. L. 101-601; Sec. 105(d)(3), Title I, Pub. L. 101-644 (Indian Arts and Crafts Act of 1990).

See also 23 U.S.C. 101 (deeming Alaska Native villages on the same footing as Indian reservations for purposes of the Federal-Aid Highway Act); 29 U.S.C. 750(d) (deeming handicapped Native Americans residing on ANCSA corporate lands to be eligible beneficiaries of special vocational rehabilitation grant programs administered by tribes); 42 U.S.C. 2992c(2) (Native American Program Act) (equating lands under jurisdiction of Alaska Native village tribes, including ANCSA corporate lands, with Indian reservations); 42 U.S.C. 5318(n)(2)(A) (equating Alaska Native village tribes with reservation-based tribes in the Urban Development Action Grant Program); Secs. 403(9), 409 of Title IV, Pub. L. 101-630 (Indian Child Protection and Family Violence Prevention Act) (treating ANCSA corporate lands identically to Indian reser-

which petitioner elects to ignore.⁴⁰ Those statutes, and the hundreds of millions of dollars annually appropriated to and for the benefit of Alaska Native village tribes, draw their constitutional authority from Congress's power under Article I, sec. 8, cl. 3 of the Constitution "to regulate Commerce . . . with the Indian Tribes" (emphasis added). Since Congress's constitutional authority to provide benefits and to legislate with respect to Native Americans is based on the *political* relationship with their

vation lands for purposes of funding village tribal child abuse treatment grant programs).

Each of these statutes deliberately distinguishes and excludes the village corporations established under ANCSA. In other statutes, however, special concerns have led Congress to make ANCSA corporations eligible for a particular program. See, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450, 450b((e) (adding ANCSA corporations to the Act's provisions would extend to certain urban areas such as Anchorage where there may not have existed any recognized tribe, see *Cook Inlet Native Assn. v. Bowen*, 810 F.2d 1471, 1475 (9th Cir. 1987)); 15 U.S.C. 637(a)(13) (making the tribal minority contractor provisions of the Small Business Act also available to ANCSA corporations).

⁴⁰ Petitioner only cites to the Clean Water Act, 33 U.S.C. 1377 and the Resource Conservation and Recovery Act, 42 U.S.C. 6901, statutes which are not inconsistent with this course of dealing. Pet. Br. at 36 n. 41. Despite the unusually restrictive definition of "Indian tribe" in 33 U.S.C. 1377(h)(2) of the Clean Water Act, clearly Alaska Native villages defined in ANSCA are eligible for the waste and sewage treatment grant programs specified in subsection (c) (expressly including "Alaska Native Villages"). Whether an Alaska tribe can qualify to be treated as a state under one of the alternatives in subsection (e) by establishing that it occupies a "reservation" is uncertain, although the disclaimer (addressing tribal powers, but not tribal status) in subsection (g) secured by the Alaska congressional delegation would appear to be unnecessary if the villages had been categorically excluded as a matter of law. Moreover, that aspects of a statutory program may, by congressional directive, not apply to Alaska tribes hardly supports the proposition that the villages are not really tribes in the first place. As for the Resource Conservation and Recovery Act, the State is simply wrong: the Act's definition of tribes clearly includes Alaska Native villages, 42 U.S.C. 6903(13)(A).

tribes, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974), the fact that the benefits are provided to Alaska Native villages itself is cogent proof of the Native villages' tribal status. *Sandoval*, 231 U.S. at 23, 39-41, 46-47. See also *Smith and Kancewick* at 480-82, 514-15.⁴¹

In exercising its delegated responsibility for determining which recognized Native American tribal entities may secure the benefit of certain legislation, the Executive Branch has likewise consistently determined that all the Native villages listed in ANCSA exercise substantial tribal governmental functions for such purposes as tax exemptions, revenue sharing, and law enforcement.⁴² Similarly, virtually every department of the Federal Government views and deals with the Alaska villages identified in ANCSA as recognized tribal governments.⁴³ These de-

⁴¹ Petitioner would create a novel new doctrine of federal Indian law: a "tribe" may be recognized only for certain purposes, and to be a fully recognized tribe, Congress must somehow do more than recognize the tribe's status as such in one or more particular contexts. Thus, like the elusive partial pregnancy, a Native community can be partly a tribe and partly not.

There is simply no such doctrine. The issue in this Court has never been whether a tribe is recognized as such in a particular context just for a particular purpose. Rather, the issue consistently has been whether, as a recognized tribe, a tribe possesses a particular authority or immunity. See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978). Petitioner's misplaced reliance on certain "disclaimer" clauses goes to this issue of tribal powers, not the issue of recognized tribal status. Pet. Br. at 35. By contrast, the extent of Respondents' tribal powers, and the degree to which Congress may have legislated with respect to those powers, are issues not directly implicated in this case.

⁴² See respectively, 26 U.S.C. 7701(40) and 26 C.F.R. 305.7701-1; Rev. Proc. 83-87; and Rev. Proc. 86-17; 31 U.S.C. 6701(a)(5)(B) (repealed April 7, 1986, Pub. L. 99-272, Title XIV, Sec. 14001(a)(1), 100 Stat. 327); 42 U.S.C. 5603(a) and *Department of Justice Law Enforcement Assistance Administration, Determination of Eligibility of Alaska Native Villages*, 45 Fed. Reg. 46581 (July 10, 1980).

⁴³ See e.g., 13 C.F.R. 316.2 and 317.2 (Economic Development Administration (EDA) local public works programs); 13 C.F.R. 318.2 (EDA community emergency drought relief program); 24

C.F.R. 571.4(k) (Housing and Urban Development (HUD) community development block grants); 24 C.F.R. 596.3 (HUD enterprise zone development program); 26 C.F.R. 305.7701-1(a) (Internal Revenue Service Indian Tribal Government Tax Status Act program); 31 C.F.R. 51.2(j) (Treasury Department local government financial assistance program); 31 C.F.R. 52.2(h) (Treasury Department antirecession local government program); 44 C.F.R. 205.251(b) (Federal Emergency Management Agency disaster assistance program); 45 C.F.R. 1061.51-3(i) (Department of Health and Human Services (DHHS) crisis intervention program); 45 C.F.R. 1336.10 (Administration for Native Americans programs) (see also 55 Fed. Reg. 49004 (November 23, 1990) (special ANA Alaska initiative established in part to "strengthen village government" and generally improve village tribal self-governance)).

See also 5 C.F.R. 334.102 (Office of Personnel Management (OPM) regulations under the Intergovernmental Personnel Act); 7 C.F.R. 1944.656(g)(2) (Farmers Home Administration); 7 C.F.R. 3015 App. A (Department of Agriculture (DOA) federal assistance); 7 C.F.R. 3016.3 (DOA uniform administrative requirements for grants and cooperative agreements to local governments); 10 C.F.R. 600.3 and 600.402 (Department of Energy uniform administrative requirements for grants to local governments); 13 C.F.R. 143.3 (Small Business Administration uniform administrative requirements for grants to local governments); 15 C.F.R. 24.3 (Department of Commerce uniform administrative requirements for grants to local governments); 22 C.F.R. 135.3 (State Department uniform administrative requirements for grants to local governments); 24 C.F.R. 85.3 (HUD uniform administrative requirements for grants to local governments); 25 C.F.R. 23.2(i) (Department of Interior (DIO) Indian Child Welfare Act program); 25 C.F.R. 26.1(h) (DOI adult employment assistance program); 25 C.F.R. 27.1(j) (DOI adult vocational training program); 25 C.F.R. 256.2(f) (DOI housing improvement program); 28 C.F.R. 66.3 (Department of Justice uniform administrative requirements for grants to local governments); 29 C.F.R. 97.3 (Department of Labor (DOL) uniform administrative requirements for grants to local governments); 29 C.F.R. 1470.3 (Federal Mediation and Conciliation Service uniform administrative requirements for grants to local governments); 32 C.F.R. 278.3 (Department of Defense uniform administrative requirements for grants to local governments); 34 C.F.R. 80.3 (Department of Education (DOE) uniform administrative requirements for grants to local governments); 34 C.F.R. 221.71 (DOE school construction program); 36 C.F.R. 1207.3 (National Archives uniform administrative requirements for grants to local governments); 38 C.F.R. 43.4 (Veterans

partmental actions echo the longstanding position of the Secretary of the Interior that Alaska Native villages are

Administration uniform administrative requirements for grants to local governments); 40 C.F.R. 31.3 (Environmental Protection Agency uniform administrative requirements for grants to local governments); 45 C.F.R. 74.3 (DHHS grant regulations); 45 C.F.R. 92.3 (DHHS uniform administrative requirements for grants to local governments); 45 C.F.R. 1061.50-9(f) (DHHS community food and nutrition program); 45 C.F.R. 1157.3, 1174.3 and 1183.3 (National Foundation on the Arts and Humanities uniform administrative requirements for grants to local governments from the National Endowment for the Arts, the National Endowment for the Humanities and the Institute for Museum Services); 45 C.F.R. 1207.1-2 (DHHS senior companion program); 45 C.F.R. 1208.1-2 (DHHS foster grandparent program); 45 C.F.R. 1234.3 (DHHS uniform administrative requirements for grants to local governments); 45 C.F.R. 2015.3 (Commission on the Bicentennial of the U.S. Constitution uniform administrative requirements for grants to local governments); 49 C.F.R. 18.3 (Department of Transportation (DOT) uniform administrative requirements for grants to local governments).

To the same effect, the Equal Employment Opportunity Commission has consistently ruled that Alaska villages are tribes under the "Indian Tribe" exemption to the 1966 Civil Rights Act, 42 U.S.C. 2000e(b). *Aloysius v. Yukon-Kuskokwim Health Corporation*, No. 380-880-972 (E.E.O.C. Seattle Dist. Apr. 15, 1988); *Zharoff v. Kodiak Area Native Assn.*, No. 380-880-136 (E.E.O.C. Seattle Dist. Mar. 11, 1988); *Wuitschick v. Copper River Native Assn.*, No. 380-880-216 (E.E.O.C. Seattle Dist. Mar. 11, 1983) (all involving multi-tribal confederations).

See also 24 C.F.R. 600.7(g) (HUD comprehensive planning assistance program); 24 C.F.R. 913.102 (HUD public and Indian housing programs); 25 C.F.R. 81.1(w) (DOI tribal reorganization under a federal statute); 25 C.F.R. 87.1(g) (DOI use or distribution of Indian judgment funds); 25 C.F.R. 101.1(e) (DOI revolving loan fund program); 25 C.F.R. 151.2(b), (c) (DOI land acquisition program); 25 C.F.R. 286.1(h) (DOI Indian business development program).

See also 43 C.F.R. 4300.0-5 (DOI reindeer grazing program); 50 C.F.R. 173 (DOI endangered and threatened wildlife program); 50 C.F.R. 18.3 (DOI marine mammal program); 50 C.F.R. 215.2 (National Marine Fisheries Service (NMFS) Pribilof Islands, Alaska marine mammal program); and 50 C.F.R. 216.3 (NMFS marine mammal program) (all containing definitions of "Alaska Native").

self-governing tribes with the power to regulate the affairs of their citizens.⁴⁴ In the face of this formidable record it is simply far too late in the day to seriously question the Federal Government's consistent treatment of the Native villages, including Respondents Noatak and Circle, as recognized tribes.⁴⁵

⁴⁴ See 47 Fed. Reg. 53133-34 (Nov. 24, 1982); 48 Fed. Reg. 5682, 5686 (Dec. 23, 1983); 50 Fed. Reg. 6055 (Feb. 13, 1985); 51 Fed. Reg. 25115 (July 10, 1986); 53 Fed. Reg. 52829 (Dec. 29, 1988) (all listing the ANCSA villages as federally recognized tribes, and the latter adding the ANCSA corporations due to their eligibility under certain statutes); *Aboriginal Fishing Rights in Alaska*, 57 I.D. 461 (1942); *Status of Alaskan Natives*, 53 I.D. 593, 605 (1932); *Hearings Before the Subcomm. of the Senate Comm. on Interior and Insular Affairs on S. 2037 and S.J. Res. 162*, 80th Cong., 2d sess. 149 (testimony of Theodore H. Haas, Chief Counsel, Bureau of Indian Affairs on proposals to repeal the IRA), 434-449 (setting forth 1945 ruling of Harold L. Ickes, Secretary of the Interior on resolving certain claims of the Hydaburg, Klawock and Kake Indians), 582-583 (testimony of Mastin G. White, Solicitor, Dept. of the Interior, discussing Alaska tribal aboriginal rights); *Validity of Marriage by Custom Among the Natives or Indians of Alaska*, 54 I.D. 39, 42 (1932); and 51 Fed. Reg. 28779 (Aug. 11, 1986); 48 Fed. Reg. 21378 (May 12, 1983); 48 Fed. Reg. 30195 (June 30, 1983) (setting forth the Secretary's approval of tribal liquor ordinances for Minto, Chalkytsik and Northway, respectively, pursuant to 18 U.S.C. 1161).

⁴⁵ Congressional treatment long preceding ANCSA further supports this conclusion. See e.g., Section 8 of the First Organic Act of May 17, 1884, c. 53, 23 Stat. 24 (discussed in *Tee-Hit-Ton v. United States*, 348 U.S. at 278; *United States v. Berrigan*, 2 Ak. Rpts. 442 (D. Alaska 1904)); Section 27 of the Second Organic Act of June 6, 1900, c. 786, 31 Stat. 321 (also discussed in *Tee-Hit-Ton*); Alaska Native Allotment Act of 1906, c. 2469, 34 Stat. 197 (granting Alaska Natives rights to land allotments similar to those afforded tribal Indians elsewhere); the Snyder Act of November 2, 1921, c. 115, 42 Stat. 208, 25 U.S.C. 13 (authorizing appropriations for the general support of Indian tribes); the Native Townsite Act of 1926, c. 379, 44 Stat. 629 (providing for conveyance of public lands by restricted title to Natives in townsites); the Indian Reorganization Act of 1934, 25 U.S.C. 476, 479 (authorizing Alaska tribes to reorganize their tribal governments), 473a (amending the Act to facilitate its application to village tribes); the Reindeer Industry Act of 1937, c. 897, 50 Stat. 900, 25 U.S.C. 500-500 (providing for

2. Congressional and Executive Branch Recognition of the Tribal Status of Alaska Native Villages is Consistent with the Activities of the Tribes Today.

There is no clearer reflection of the tribal status of Alaska Native villages than in the present day activities of their tribal governments in protecting and advancing the health and welfare of their people. For instance, Alaska tribes and confederations staff and administer dozens of clinics and hospitals across the state, providing such services as general hospitalization and medical care, maternal child health programs, prematernal and child delivery care, consumer education, and dental and eye care. They also provide hepatitis immunization, environmental health programs, substance abuse treatment, accident prevention and emergency medical programs, mental health counseling and an extensive tribally-based community health aide program. With BIA-funded contracts, ANA-funded grants, and other sources Alaska's tribes also administer programs for agricultural assistance, adult basic education, higher education scholarships, direct employment, adult vocational training and housing improvement assistance.⁴⁶ Among a wide range of other tribal govern-

the Secretary's acquisition of all reindeer in Alaska and their subsequent distribution to Natives); Section 4 of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, *as amended*, 73 Stat. 141, 48 U.S.C. prec. 21 note (requiring the State to disclaim any right or title to Native occupied lands, leaving their disposition to the Federal Government and exempting Native lands from state taxation); Public Law 83-280, *as applied* to Alaska in 1958, codified in part at 18 U.S.C. 1162(a) and 28 U.S.C. 1360(b) (granting Alaska criminal jurisdiction in Indian country and civil jurisdiction over causes of action arising in Indian country but withholding any authority for state taxation of restricted Native tribal property).

⁴⁶ Some, like *amicus* Native Village of Tanana, annually administer hundreds of thousands of dollars in IHS and BIA programs serving tribal members. Other villages band together into confederations to achieve economies of scale, as is the case with the Tanana Chiefs Conference (TCC), a coalition of some 40 Athabaskan tribes in the Interior of Alaska. In federally funded health care programs alone, TCC annually administers \$11 million in programs.

ment services are state court intervention and tribal court management in children's cases subject to the Indian Child Welfare Act,⁴⁷ family counseling, child advocacy and increasingly active trial and appellate tribal court systems.

Not surprisingly, Alaska's tribal governments engage in the usual and customary activities of any small local government.⁴⁸ These include such mundane matters appropriate to village life as regulating all-terrain vehicle use, animal control problems, alcohol and illicit drug use, curfews, and other matters protective of the general welfare of the community. They provide by ordinance for the election of council members and other elected tribal officials and for the determination of tribal citizenship. They raise governmental funds through a variety of means, including taxes,⁴⁹ user fees, bingo revenues and business ventures. They provide such basic necessities as fuel and water, and operate and maintain fire departments. They use tribal funds to build clinics, employ staff and evacuate emergency patients by air transport to medical facilities in Fairbanks or Anchorage. They employ village public safety officers, adjudicate civil disputes and minor crimes, operate water treatment programs, operate tribal courts, collect sales taxes and carry out alcohol control measures (including tribal liquor ordinances certified and approved by the Secretary of the Interior under 18 U.S.C. 1161). Some administer tribal employment rights ordinances to maximize Native hire in village-based projects. Most also administer substan-

⁴⁷ 25 U.S.C. 1901 *et seq.* Many of the villages in Alaska participate in ICWA cases, and have adopted children's codes and other family ordinances.

⁴⁸ Approximately one-half of the Alaska tribes are situated outside any state-chartered local government; their traditional governments are thus the only active governments in their villages. In these areas the State recognizes their tribal governments as the only elected leadership for the administration of state-funded local programs.

⁴⁹ For example, as part of a growing trend, *amicus* Native Village of Akiachak administers a local sales tax to support general government services.

tial state-appropriated funds as a key partner with the State in forging comprehensive and effective local governance.

In one example typical of many Native villages, *amicus* Native Village of Tatitlék in Prince William Sound (near the EXXON VALDEZ tanker disaster) runs government programs and facilities; acquires and disposes of real property; raises and spends government funds; regulates land use, play areas and the cemetery; intervenes in child welfare matters; administers day care services; operates a clinic; administers sewer and solid waste facilities; provides community utilities (including electric, water and home heating oil); maintains roads and an air field; issues licenses; regulates alcohol; enforces animal control ordinances; and carries out all the other services and programs incident to the governance of a 120-member tribe.

Tribal governments in the Northwest Alaska Inupiaq and Gwitch'in regions are typical. The eleven villages in the Northwest Arctic exhibit varying degrees of tribal governmental activity. For instance, as early as 1908 Noatak had in place a seven-member tribal council which passed regulations governing such matters as house location, lot size, sanitation and dog control.⁵⁰ The current Tribal Council is organized under the IRA and is the sole governing body for the Village. Among other things, it operates the local utilities⁵¹ and is currently engaged in the construction of a multimillion dollar water and sewer project through the Federal Emergency Management Agency.

Amicus Native Village of Kotzebue is the largest tribe in this region with some 1,800 members, most of whom live in Kotzebue. The Tribe operates a wide array of programs under BIA contracts to provide higher educa-

⁵⁰ See generally Case at 443 and materials cited therein.

⁵¹ See Noatak Utility Board Rules & Regulations for Utility Services adopted August 29, 1990 (copy lodged with the Clerk of the Court). See also Noatak Ordinance No. 90-01.

tion, housing improvement and employment assistance. The Tribe also employs a full-time social worker to administer activities under the Indian Child Welfare Act, including regular intervention in state court children's proceedings, investigation of foster and pre-adoptive placements, and related home studies. The other villages in the region are similarly active.⁵²

The governmental activities of the Gwitch'in tribes are equally extensive. The Circle Village Council is the sole government in Circle, and works cooperatively with the Circle Civic Association. The Council currently is administering a federal housing grant and a grant to build an electrical line. It is also administering a state-federal grant to build a washerateria and shower facility. The Council intervenes in ICWA cases and is presently redesigning its tribal court.

Amicus Native Village of Venetie is perhaps the most active of all of the Gwitch'in tribes. The Venetie Tribal Council owns 1.4 million acres comprising its former reservation and has developed numerous ordinances governing those lands, such as the control of gambling, a prohibition on alcohol, and regulation of family relations,

⁵² For instance, *amicus* Village of Selawik is organized under the IRA and has adopted ordinances governing tribal member enrollment (Ordinance 88-01) and the Akuligaaq Tribal Court. See generally Native Village of Selawik Ordinance No. 87-01. As is typical of any villages it administers a contract from the Bureau of Indian Affairs to support the operation of its tribal government. Selawik IRA Council Contract No. E00C14203174 (Fiscal Year 1989). *Amicus* Kiana Village organized under a tribal constitution adopted by the tribal members, had a budget in 1988 of \$94,000 from the Bureau of Indian Affairs to operate village governmental programs including higher education, tribal operations, housing improvement, employment and vocational education programs. The tribe also operates the Katyaak Tribal Court. Kiana Ordinance No. 86-01, December 11, 1986. *Amicus* Native Village of Kivalina, also organized under the IRA, was recently awarded a two-year \$80,000 grant from the ANA to "enable the Kivalina IRA Council to develop a tribal infrastructure and council training for the Native village." See ANA Award No. 10NA0171/01 (June 9, 1990).

animal control, speed limits and hunting. These ordinances are a codification of traditional law, and their application and enforcement is subject to the rulings of the Venetie Tribal Court. The Council also regulates general relations among the members, operates the airports, leases land to the schools and levies taxes.⁵³

The foregoing profile of the Northwest Arctic and Gwitch'in tribes is typical of other tribes throughout Alaska. Congress with good reason identified the Alaska Native tribes in ANCSA: that recognition accorded with their history. And with good reason Congress has repeatedly since ANCSA supported the tribes' modern-day activities of self-government. Bolstered and strengthened by a multitude of federal programs and federal initiatives implemented since 1971, these tribes are the linchpin of Alaska Native self-determination today. The Ninth Circuit recognized this when it correctly concluded that if the Eleventh Amendment is not a bar to the Respondents' suit, they are as fully entitled to redress the deprivation of their tribal rights in federal court as any other recognized Native American tribe.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

⁵³ Similarly *amicus* Native Village of Fort Yukon manages approximately \$700,000 in grants per year, including capital improvement, self-determination, land management and a radio station, and has enacted a child-in-need-of-aid ordinance. It has also established a tribal court which issues adoption decrees. *Amicus* Beaver has promulgated extensive ordinances in such areas as speed limits, animal control and discharge of firearms. It also engages in housing rehabilitation activities and has established a tribal court for ICWA cases.

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